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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CAROL HOOD, *as guardian ad litem of Zachary Hood, a minor,*

Petitioner,

v.

MEDFORD TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents offer an assortment of alleged factual distinctions between the viewpoint discrimination in this case and that discussed in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and in the decisions of the Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits cited in our Petition. All of these attempted factual distinctions miss the point: The threshold issue below was the district court's holding—ultimately affirmed by the divided *en banc* court—that discriminating against Zachary Hood's religious speech solely because it was religious was not viewpoint discrimination at all. It is this issue of how to classify discrimination against religious speech that has divided the Courts of Appeals. The various factual circumstances that so fascinate Respondents

may be relevant to the subsequent question of whether such discrimination can be justified. They are not relevant to the question of how that discrimination is classified in the first place.

2. Contrary to Respondents' protestations, that question was in no way foreclosed by *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* dealt with the issue of *subject matter* restrictions on student speech in a school-sponsored newspaper that was part of the school curriculum. The Court held:

> educators do not offend the First Amendment by exercising editorial control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (emphasis added). This Court, in *Hazelwood*, did not deal at all with *viewpoint*-based restrictions in such non-public fora because, as Justice Brennan observed, the school officials in that case had conceded that their policy must be viewpoint neutral. *See id.* at 287 n.3 (Brennan, J., dissenting).

Hazelwood was thus a particular application of the rule laid down in *Cornelius v. NAACP Legal Defense & Ed. Fund.* 473 U.S. 788 (1985). *Cornelius* held that discrimination based on subject matter and speaker identity in a non-public forum is permissible "so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*." *Id.* at 806 (emphasis added). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (observing that *Cornelius* and other cases permit "reasonable and viewpoint-neutral content-based discrimination in nonpublic forums"). Neither *Hazelwood* nor any other decision of this Court supports the notion that viewpoint discrimination may be upheld on anything less than a compelling governmental

interest.[1] To be sure, what is compelling in a grammar school may not be compelling in a high school. And what is compelling there may not be compelling in an adult forum. But, once again, that is a subsequent question. The question presented in this case is whether discrimination against religious speech solely because it is religious is viewpoint discrimination in the first instance.

3. Respondents also attempt to erect various procedural barriers to this Court's review. None is daunting. Respondents argue that qualified immunity may ultimately be available to some of the Respondents. This is beside the point for two reasons. First, as Judge Alito noted below, "of course the qualified immunity defense would not apply to the school board in its official capacity." App. 26a (citing *Owen v. City of Independence*, 445 U.S. 622, 639-650 (1980)).[2] Second, even

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[1]Even in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), this Court emphasized that school officials' discipline of a student for giving a sexually suggestive campaign speech was not viewpoint discrimination. *See Bethel*, 478 U.S. at 685 ("the penalties imposed in this case were unrelated to any political viewpoint").

[2]Respondents attempt to circumvent this point by claiming that Petitioner has not alleged "any policy, custom or practice on the part of the Respondent Medford Township Board of Education. App. 7a, 9a." That is incorrect. The portions of the Court of Appeals' opinion which Respondents cite for that proposition are not about the Board's involvement in the story incident, but about the separate claim regarding the removal of Petitioner's Thanksgiving poster. As for the story incident, the complaint alleges that Petitioner made a "formal demand upon . . . Defendant Township of Medford Board of Education" but that the Board of Education "failed to respond

those Respondents who can argue for qualified immunity can only do so later. As Judge Alito also noted, this case comes to this Court after the grant of Respondents' motion for judgment on the pleadings. Thus, even if the Court "were to entertain the qualified immunity argument at this time, [it] would still be required, as the first step of [its] analysis, to decide whether the complaint stated a First Amendment claim." App. 26a (citing *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982)). Respondents' belated theory of qualified immunity (*see* App. 26a) should be heard, if at all, on remand. It should not dissuade this Court from granting plenary review.

Finally, Respondents argue that "the exercise of this Court's certiorari jurisdiction . . . should await final judgment." Respondents' Brief at 17-18. However, as we discussed in our Petition at pp. 17-18, this case in its present posture already is a final judgment within the meaning of this Court's precedents. Even Respondents acknowledge that the decision on the story incident was affirmed by the Court of Appeals, and that the poster incident which the lower court remanded is a separate claim:

> The Third Circuit specifically affirmed the District Court's judgment on the pleadings with respect to [the story] claim. There is another claim not before this Court which has been remanded to the District Court for further factual development.

Respondents' Brief at 2.

In short, the Courts of Appeals are divided over the question of how to characterize discrimination against religious

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to these demands." Complaint ¶ 23. *See also* App. 45a; App. 74a-75a. Under the standard set forth in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993), these allegations are sufficient.

speech solely because it is religious. And this case, together with *Good News Club v. Milford Central School*, No. 99-2036, is an appropriate vehicle for resolving that conflict.

CONCLUSION

For the foregoing reasons, and for those reasons stated in the Petition, the Petition for a writ of *certiorari* should be granted or, in the alternative, should be held for disposition in light of this Court's decision in *Good News Club v. Milford Central School*, No. 99-2036.

Respectfully submitted,
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